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In re Patent No. 5,453,758
Issue Date: September 26, 1995
Application No. 08/098,896
Filed: July 29, 1993
Attorney Docket No. SON417

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ON PETITION

This is a decision on the petition under 37 CFR 1.378(b), filed June 30, 2006, to accept the unavoidably delayed payment of a maintenance fee for the above-identified patent.

The petition is **DISMISSED**.

If reconsideration of this decision is desired, a petition for reconsideration under 37 CFR 1.378(e) must be filed within TWO (2) MONTHS from the mail date of this decision. No extension of this 2-month time limit can be granted under 37 CFR 1.136(a) or (b). Any such petition for reconsideration must be accompanied by the petition fee of \$400 as set forth in 37 CFR 1.17(f). **The petition for reconsideration should include an exhaustive attempt to provide the lacking item(s) noted below, since, after a decision on the petition for reconsideration, the Director will undertake no further reconsideration or review of the matter.**

A petition to accept the delayed payment of a maintenance fee under 35 USC 41(c) and 37 CFR 1.378(b) must be accompanied by (1) an adequate showing that the delay was unavoidable, since reasonable care was taken to insure that the maintenance fee would be paid timely, (2) payment of the appropriate maintenance fee, unless previously submitted, and (3) payment of the surcharge set forth in 37 CFR 1.20(i)(1). **This petition lacks item (1) above.**

The patent issued on September 26, 1995. Accordingly, the second maintenance fee (7 1/2 year) could have been paid during the period from September 26, 2002 through March 26, 2003 without a surcharge, or during the period from March 27, 2003 through September 26, 2003 with a surcharge. Because the second maintenance fee was not received within either of the aforementioned periods of time, the patent expired midnight on September 26, 2003. 35 USC 41(b).

Petitioner states that the failure to pay the 7 1/2 year maintenance fee was the result of a clerical error. The firm Rader, Fishman, and Grauer (hereinafter "Rader") was the responsible party for docketing and paying the maintenance fees until they received a notice dated January 10, 2003 from applicant that

stated that the responsibility for the reissue application (and by implication, the original patent) was being transferred to Computer Packages Inc. (hereinafter "CPI"). While Rader was notified of the transfer of responsibility to CPI, it is alleged that due to a clerical error the instant application was coded with an incorrect status code and was not included in the list of applications in the notification given to CPI. Therefore CPI was not apprised that they had responsibility for the application and failed to remit the maintenance fee payment in the corresponding original patent.

A delay resulting from an error (e.g., a docketing error) on the part of an employee in the performance of a clerical function may provide the basis for a showing of "unavoidable" delay, provided it is shown that: (1) the error was the cause of the delay at issue; (2) there was in place a business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance; (3) and the employee was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employee represented the exercise of due care. See MPEP 711.03(c)(III)(C)(2).

An adequate showing requires statements by all persons at Sony with direct knowledge of the circumstances surrounding the delay, setting forth the facts, as they know them. Petitioner must supply a thorough explanation of the docketing (at Sony) and call-up system in use and must identify the type of records kept and the person responsible for the maintenance of the system. This showing must include copies of mail ledger, docket sheets, filewrappers and such other records as may exist which would substantiate an error in docketing, and include an indication as to why the system failed in this instance to provide adequate notice that a reply was due. Petitioner must also supply information regarding the training provided to the Sony personnel responsible for the docketing error, degree of supervision of their work, examples of other work functions carried out, and checks on the described work which were used to assure proper execution of assigned tasks.

The explanation provided in the letter dated June 26, 2006 from Sanae Takada from Sony is insufficient to support a showing of unavoidable delay due to docketing error, i.e. there is a lack of evidence showing items (1) thru (3) above. The letter from Takada stated that there was no written procedure for managing the docketing of applications having a related reissue case at the time this error occurred and the personnel responsible for the error was assumed to be an inexperience clerk. Therefore one cannot deem that the cause of the delay was unavoidable since there is no showing that applicant was careful or prudent in his most important business in relying on Sony's system and personnel within the meaning of *In re Katrapat*.

Accordingly, the showing of record fails to demonstrate that the delay was unavoidable within the meaning of 37 CFR 1.378(b) and 35 USC 41 (c).

Further correspondence with respect to this matter should be addressed as follows:

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